

## APPLICATION OF THE CRIMINAL LAW IN CONTRACTING SYSTEM AND STATE DEFENSE ORDER VIOLATIONS

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The subject. The article is devoted to analysis of court practice concerning crimes in public procurement.

The purpose of the paper is to solve the problem of delimitation of theft committed by the perpetrator with the use of his official position, from abuse of official powers and official forgery is topical.

The methodology. General scientific methods as analysis, synthesis, induction, deduction, comparison were used. The system method allowed to consider misdemeanors and a set of rules providing for responsibility for their commission, in conjunction with public relations, which need criminal law protection. The functional approach made it possible to address the issues of qualification for official crimes against the contract system and the state defense order, taking into account the forms and methods of activity of the subjects of contractual relations.

Results and scope of application. An important role in improving the effectiveness of public procurement is played by officials who, in dealing with suppliers of goods and executors, are called upon to defend public interests. The public danger of crimes committed by officials in this sphere is manifested in the destruction of the material basis of the functioning of the state, undermining its defensive capacity and reducing the level of security. Judicial practice testifies to the lack of uniform approaches to the qualification of crimes committed in the sphere of execution of the state and municipal contract.

The article proposes criteria for delimiting the encroachments of officials on the expenditure of budgetary relations, taking into account the addition of the criminal law to norms that provide for responsibility for abuse in the performance of the state defense order (art. 201.1 and 285.4 of the Criminal Code of the Russian Federation). In

the qualification of crimes committed in the sphere of contractual relations, and the application of art. 201.1 and 285.4 of the Criminal Code of the Russian Federation are proposed to be guided by the recommendations of the Supreme Court of the Russian Federation on the delimitation of abuse of official powers from embezzlement. Conclusions. It is necessary to proceed from the existence of two lines of activity of the customer. The first is the acceptance of the delivered goods, the work performed, the services rendered. The second is payment for goods, work and services.

## **1. Introduction**

The development of the state and its functions is conditioned by internal social and economic contradictions and foreign policy problems. The solution of both is possible only if there is a reliable economic base. The essence and content of the state's economic function is influenced by the state regime and the ways and limits of regulating economic processes conditioned by it. The economy can be distributive or market. But in both cases, the economic function is to ensure the balance of the state, representing the whole society and the subjects of entrepreneurial activity. Such a balance is ensured in the framework of the contract system and the state defense order. An important role in improving the effectiveness of public procurement is played by officials who, in dealing with suppliers of goods and executors, are called upon to defend public interests. The public danger of crimes committed by officials in this sphere is manifested in the destruction of the material basis of the functioning of the state, undermining its defensive capacity and reducing the level of security.

## **2. Qualification of encroachments on the contract system of the state and the state defense order.**

### **2.1. The ratio of crimes against property and against the order of management.**

The analysis of judicial practice testifies to the absence of unified approaches to the qualification of the investigated encroachments.

For example, in part 2 Art. 286 of the Criminal Code of the Russian Federation (hereinafter – CC RF) the actions of the head of local self-government T. who qualified for paying a bribe in payment for the works actually not performed by the contractor M. were qualified by the RF. The court found: T., knowing with certainty that the works under the contract for the repair of the cultural center "... are not fully implemented, clearly exceeding their authority, gave illegal instructions to M. to draw up and sign on his part certificates of acceptance of the works performed and invoices. Then, having received them, he himself signed and "wrote off" to the accounts department for payment. As a result, material damage was caused to the amount of <...>, discredited bodies of municipal authority, essentially protected by law interests of society and the state". It follows from the above decision that the head of local self-government was authorized to make a decision on the acceptance of works performed and their payment. But he used these powers unreasonably and out of self-interested interest, which was expressed in the bribe received. It turns out that the material damage caused to the municipality is a consequence of the abuse of T. administrative and economic powers.

In the investigated situation, the question arises of the delineation of crimes provided for by Part. 2 Art. 285 CC RF and Art. 160 CC RF. In the latter case, abuse of administrative and economic powers is a way of misappropriation or embezzlement of others' property. Unlike theft, abuse of official authority is not related to the seizure of someone else's property. In order to

correctly qualify the actions of the head of local government, it is necessary to determine the direction of the material damage caused to them. As such, you can consider part of the funds listed by the contractor, corresponding to the cost of outstanding work. We believe that for executives who sign invoices to pay for the work performed, the Decision of the Plenum of the Supreme Court of the Russian Federation of July 9, 2013 No. 24 "On judicial practice in cases of bribery and other corruption crimes" which explains that the actions of an official who "... concluded on behalf of the relevant body (institution) a contract, on the basis of which he transferred the funds entrusted to him in a size significantly exceeding market value of the goods, works or services specified in the contract, having received for this illegal compensation ... it is necessary to qualify on a set of crimes as embezzlement of the property entrusted to it ( Art. 160 of the Criminal Code of the Russian Federation) and how it was received bribes (Art. 290 CC RF).

Justified for the commission of a crime, under Part 4 Art. 159 CC K., who "... assuming the post of deputy head of the federal enterprise "with the right to sign financial and economic documents of the enterprise and acting as chief accountant with the right to the second signature of payment documents, having received the state order for the construction of military unit storage areas, having selfish intent aimed at the theft of budgetary funds, abusing the trust of the customer by overstating the volume of construction and installation works, manufactured, signed and provided for payment to the customer a fictitious Acts of Acceptance of Completed Works ..., accounts, as well as other financial and economic documents containing knowingly false information about the work performed for a total of 44,870,513 rubles 09 kopecks". In the example, the culprit kidnapped budget funds by deception, which consisted in falsification and subsequent submission of documents on the work performed.

In December 2017 the criminal law was supplemented by Art. 285<sup>4</sup> CC RF, which provides for responsibility for the use by an official of his official powers contrary to the interests of the service, if this act is committed from mercenary or other personal interest and entailed a significant violation of the interests of the society or state protected by law when carrying out the state defense order. It is important to emphasize that the perpetrators of the crime provided for in Art.285<sup>4</sup> CC RF, there can be not only officials of the state customer, but also officials of the state enterprises of the defense industry complex, which are the main executors and executors of the deliveries of products. The subjects of malfeasance are recognized since July 2015 after the introduction of changes to the note to Art. 285 CC The Russian Federation. The executors of the defense order can be enterprises and organizations, regardless of the form of ownership, having a license to engage in the relevant type of activity. When delimiting the crime provided for in Art. 285<sup>4</sup> CC RF, from theft with the use of official position should be guided by the general rule of delimitation of abuse of official powers from self-interested interest from theft.

An extremely common and obvious criminalization of contractual relations as a whole, and not only in the execution of the state defense order Foot, causes accentuated the need for their criminal law protection. For example, the Criminal Code of the Kyrgyz Republic (Enacted by the Law of the KR of January 24, 2017 No. 10 from 1 January 2019) contains an Article 322 "The conclusion of a knowingly unprofitable contract", which provides for punishment for "the official conclusion of a contract that is obviously unfavorable for the state, as well as the exercise by such an official of public procurement that caused major damage." The responsibility of the second party entering into a contractual relationship with the state is stipulated in art. 224 CC CR, punishing for "deliberate or careless violation of the procedure for conducting public auctions, auctions or tenders, as well as the conclusion of a knowingly unprofitable contract that caused damage to a large amount to the owner of the property, the organizer of the auction or the auction, the buyer or other economic agent." If the punishment for officials who knowingly disadvantages the state contract, provided in the chapter "Corruption and other crimes against the state and municipal service", the crime provided for in Art. 224 CC there is an offense "against the interests of service in commercial and other organizations."

## **2.2. The ratio of crimes against the order of control among themselves.**

It is also erroneous, as an official forgery, which caused a substantial violation of the legitimate interests of the municipality and citizens (Part 2, Article 292 of the Criminal Code), the investigation identified actions P. - Director of the municipal budgetary institution "Single Customer Service". According to the results of the competition, he concluded a contractor agreement with OJSC for the implementation of the municipal order for the construction of an artificial football field. At the time the contract was signed, the contractor submitted to P. for signing documents containing a theoretical report on the complete completion of works for the approved costs. In fact, work related to the foundation of the football field was made with a violation of technology, instead of expensive rubble for the formation of the base of the object, a mixture containing sand, clay and other impurities was used, which created a low level of exploitation. Upon the acceptance of the site, the subordinates reported in writing to P. about the shortcomings identified and the discrepancy between the scope and quality of the works stated in the contract. Instead of presenting legal claims to the contractor, P. signed official documents - acts on acceptance of works performed, information on the cost of works performed and costs, and gave instructions on payment of the contract. As a result of the unlawful actions of the suspect, the budget of the municipality was damaged for more than 2 million 600 thousand rubles.

The qualification of the actions of P. on Part 2 Art. 292 CC RF is erroneous for the following reasons. Unlike abuse of official powers, the subject of service fraud is unauthorized to create legal consequences caused by an official document, the granting of rights or discharge from duties. When committing a crime under Art. 292 CC RF, the perpetrator uses not official powers, but an official or official position and actually introduces false information or corrections to the document that distort its content. Therefore, it is not only officials who are able to commit this attack, but also state and municipal employees who are not so. The presence of official powers is not necessary here, the performer enjoys his involvement in the official document circulation. In the example above, the director of a municipal budgetary institution was authorized to accept work. In addition, the bodies of preliminary investigation mistakenly acknowledged the material damage caused by the result of official forgery. In itself, the production of a counterfeit document cannot cause harm until the document is used as a basis for further administrative and economic decisions on spending budget funds. It seems that the perpetrator, using the powers given to him, squandered the budget funds in an especially large amount (p. 4 Art. 160 CC RF).

Thus, delimiting the crimes provided for by Art. 285 and 292 CC RF, it should be borne in mind that in case of abuse, the official uses his authority to make decisions that have legal consequences, and the official forgery - is the commission of actions aimed at falsifying decisions taken by other officials, and quasi-creation of legal consequences of virtually non-existent events. The criminal demand for the falsification of documents, and, consequently, for the decisions they certify is conditioned by the fact that they are in the competence of other officials, and not the performer of official forgery, or, these forged documents allegedly regulate specific relations that do not really exist. Thus, the crime provided for in Art. 292 CC RF committed by an official is not an explicit one, i.e. not obvious to others, but still exceeding the subject of their official powers.

Correctly the problem of the ratio of abuse of official authority and service forgery is resolved in the Appeal Decision of the Moscow City Court. District court for a set of crimes under Art. 285 CC RF, Art. 292 CC RF and Art. 290 CC RF, the actions of ASV, who served as the head of the state institution "Operation Commandant's Office of the Ministry of the Russian Federation for Civil Defense, Emergency Situations and Elimination of Consequences of Natural Disasters", were qualified for self-interest (for bribery) the customer, demanded from subordinates and himself signed acts on acceptance of the executed works. The culprit realized that the works were not actually executed, and the money was transferred for the unfulfilled obligations, before the actual performance of the work, which entailed causing significant material damage to the state in the amount of 14,499 14.58 rubles. The Moscow City Court ruled out the conviction of A.S. under Art. 292 of the Criminal Code of the Russian Federation, "since the acts committed by him constituted the objective side of the offense under Art. 285 of the Criminal Code of the Russian Federation and

additional qualifications do not require, since official forgery was a form of abuse of official authority". Indeed, the misuse of official powers often manifests itself in documenting the decisions taken. But if in the commission of a crime under Art. 285 of the Criminal Code of the Russian Federation, the perpetrator formalizes the exercise of power, organizational, administrative or administrative-economic powers, Art. 292 Criminal Code of the Russian Federation, provides for the responsibility for making false information or corrections in official documents.

After making changes to the actions of ASB. should be qualified according to Art. 285<sup>4</sup> "Abuse of official powers in the performance of the state defense order". The guilty himself did not make a decision to pay for the work performed, services rendered, but he saw the fact that the contractor fulfilled its obligations under the contract, i.e. he did not commit theft directly. In accordance with Part 1 of Art. 711 of the Civil Code, the final delivery of the results of work to the customer only gives rise to the obligation to pay the contractor a stipulated price, is not an administrative and economic decision on the payment itself. The act on acceptance of the executed works can be considered as an expert opinion on the proper performance of works or the provision of services, and the authority to certify such a fact can be defined as registration and expert.

Currently, the implementation of organizational and administrative functions by subjects of malfeasance is understood as two different types of activity: the first is the management of subordinates, the second - making decisions that entail legal consequences for persons who applied for public services. The latter powers are in fact registration and expert and are implemented to ensure the balance of interests of such persons with the interests of other citizens, society and the state. For example, such powers are vested in medical workers who conduct temporary disability examinations and issue appropriate leaflets. Examination of the graduate having the required competencies is conducted by members of the state examination (attestation) commission. In the field of state certification of scientific and pedagogical personnel, expert functions are carried out by special members of the dissertational council, who decide on awarding the academic degree. Similarly, as a piece of temporary incapacity for work guarantees the employee social benefits, but is not a decision on their production, the presence of the academic degree assumes an additional charge to the teacher's monetary content, but is not a decision on its accrual, the signing of the act on acceptance of the performed work gives rise to the obligation to pay their cost to the contractor, but is not identical to such payment.

### **3. The conclusion.**

Thus, when qualifying crimes committed in the sphere of contractual relations, and applying art. 201<sup>1</sup> and 285<sup>4</sup> of the Criminal Code of the Russian Federation, the recommendations of the Supreme Court of the Russian Federation on delimitation of abuse of official powers from embezzlement remain topical. "Unlike stealing someone else's property using official position, the abuse of official powers out of self-interest form such acts of an official who" are not connected with the seizure of someone else's property". It is necessary to proceed from the existence of two lines of activity of the customer. The first is the acceptance of the delivered goods, the work performed, the services rendered. The second is payment for goods, work and services. The activity named the first is the implementation by the official representing the interests of the customer, the expert powers that are currently considered as a kind of organizational and administrative functions (the second paragraph of paragraph 4 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of October 16, 2009 No. 19 "On judicial practice in cases of abuse of official authority and abuse of office"). Recognition by the official of the customer of the fact of the performance of the contract by the contractor is a decision entailing legal consequences - the duty to pay for the work performed. In itself, the unreasonable approval of the act of accepting the work performed, in the event of causing significant harm and establishing the selfish or other personal interest of the perpetrator, is an abuse of official authority. In turn, the administrative and economic decision on the transfer of budgetary funds to the contractor, if the official who made such decision realized that the work was not performed, was not performed in full or inadequately, should be qualified as a waste of entrusted property.

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#### **БИБЛИОГРАФИЧЕСКОЕ ОПИСАНИЕ**

##### **СТАТЬИ**

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